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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MID-CENTURY INSURANCE COMPANY,)
Plaintiff,) No. 2:19-cv-1572
vs.)
RESPONSE OF DEFENDANTS KBM
KBM SEATTLE, LLC; KEITH B.) SEATTLE AND MATHEWSON TO
MATHEWSON; SALLY MATHEWSON;) MOTION FOR SUMMARY
and MICHAEL YOUNG,) JUDGMENT
Defendants.)

I. COUNTER STATEMENT OF FACTS

KBM Seattle, LLC, (KBM) is a real estate rental company. Its sole member is Keith B. Mathewson, it has no other employees. At all times relevant to this motion KBM subleased space to various tenants at two principal locations. The first was a building located at 4841 West Marginal Way and the other buildings were located at 4600 and 4604 Delridge Way in Seattle. Other than entering into lease agreements and improving/maintaining the space KBM was leasing at these specific locations, KBM conducted no other business.

Keith Mathewson purchased a policy of insurance for KBM through Dan Gilbertson his long time Farmers insurance agent. By 2014 Gilbertson had actual knowledge that the

1 KBM was leasing space at both the West Marginal Way and Delridge locations.¹

2 For some unknown reason, when the subject policy of insurance was purchased only
 3 the Delridge Way locations were referenced in the policy. KBM's business of leasing space
 4 at both the Delridge and West Marginal Way locations were part of a singular operation, it
 5 would make no sense for KBM to insure only the Delridge properties and not the Marginal
 6 Way property. Even more peculiar, the Farmers agent listed the insured as KBM LLC on the
 7 policy. The legal name was KBM Seattle LLC.²

8 On February 16, 2016 Michael Young was injured falling off a landing in the West
 9 Marginal Way building. Young filed a lawsuit alleging negligence in King County Superior
 10 Court. The lawsuit named KBM as a defendant along with Mathewson individually and
 11 others. The matter was tendered to Mid-Century which eventually hired a lawyer to defend
 12 KBM and Mathewson. The lawsuit is pending, mediation is scheduled for January 15, 2019.

13 **A. The Mid-Century Policy.**

14 The subject policy identifies "real estate" as the business of KBM. There is no dispute
 15 that the policy provided KBM businessowners liability coverage. The policy period covered
 16 claims occurring between August 23, 2015 until August 23, 2016. There is no dispute that
 17 the accident involving Mr. Young occurred on February 12, 2016 while the policy was in
 18 effect. There appears to be no dispute that the subject policy covered bodily injury claims
 19 resulting from ordinary negligence against KBM.

20 The **BUSSINESSOWNERS LIABILITY COVERAGE FORM³** reads in part as
 21 follows:

22 *b. This insurance applies:*

23 *(1) To bodily injury and property damage only if:*

24 *(a) the bodily injury or property damage is caused by an occurrence that takes place in the*

25 ¹ See Declaration of Keith Mathewson p. 2, lines 10-15.

26 ² See Declaration of Keith Mathewson p. 2, lines 19-21.

³ Docket Document 13, p. 83.

covered territory and

(b) The bodily injury or property damage occurs during the policy period

(2) To:

(a) Personal Injury caused by an offense arising out of your business excluding advertising, publishing broadcasting or telecasting done by or for you:

(b) Advertising Injury caused by an offense committed in the course of advertising your goods products or services:

But only if the offense was committed in the coverage territory during the policy period.

The *coverage territory* is defined as follows:

4. “*Coverage territory*” means:

a. *The United States of America (including its territories and possessions), Puerto Rico and Canada;*

b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or

c. All parts of the world if:

(1) The injury or damage arises out of:

(a) Goods or products made or sold by you in the territory described in a. above;

(b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and

(2) The insured's responsibility to pay damages is determined in a "suit" on the merits in the territory described in a above or in a settlement agreement.

This broad geographic liability coverage is consistent with other aspects of the policy. For example, under the **Cyber Liability and Data Breach Coverage form** the covered territory applies to claims “*occurring anywhere in the world*”.⁴ The policy also covers advertising injury. Advertising injuries would not usually occur on a specific property. This again shows that the policy itself was more than a simple premises liability policy.

⁴ Docket Document 13, p. 33.

1 At issue in this case is whether the Designated Premises Endorsement (DPE) modifies
 2 and limits the broad geographic coverage referenced throughout the policy to a specific
 3 location. (The DPE is located after the last page of the 15-page **BUSSINESSOWNERS**
 4 **LIABILITY COVERAGE FORM.**)⁵

5 II. ISSUE

6 Does the DPE clearly and unequivocally communicate to an average purchaser of
 7 insurance that KBM liability coverage is limited to occurrences arising out of a specific
 8 location?

9 III. EVIDENCE RELIED UPON

10 1. Declaration of Keith Mathewson with attachments
 11 2. Declaration of John Follis with Attachments.
 12 3. Court file which includes Insurance policy at issue.

13 IV. AUTHORITY AND ARGUMENT

14 Mid-Century argues that the DPE limits the scope of what is covered in the policy to
 15 injuries arising out of a specific location thus invalidating the conflicting coverage territory
 16 provisions also contained in the policy. In essence, the DPE converts a Businessowners
 17 liability policy to a premises liability policy.⁶

18 Before analyzing the DPE, some general principles of insurance policy interpretation
 19 should be noted. First, an insurance contract should be interpreted according to the way it
 20 would be understood by the average purchaser. State Farm Insurance v. Emerson 102 Wn.
 21 2d 477, 686 P 2d 1189.

22 Second, if there is ambiguity arising because of the difference of language used in
 23 the endorsement and the body of the policy, or between two endorsements, the language of

24
 25 ⁵ Docket Document 13, p. 98.
 26 ⁶ There is no contention that without this DPE the injury claim against KBM pending in King County Superior
 Court would not be a covered claim.

1 the contract is construed most strongly against the insurer. 1 G. Couch, Insurance § 4:36 (2d
2 rev. ed. 1984). See also, Hilburn v. Citizens' Mut. Auto. Ins. Co., 339 Mich. 494, 498, 64
3 N.W.2d 702 (1954). Finally, "Exclusionary clauses contained in insurance policies are
4 strictly construed against the insurer." Stouffer & Knight v. Cont'l Cas. Co., 96 Wn. App. 741,
5 982 P.2d 105, 109 (Wash. Ct. App. 1999).

6 Applying these general principles to the subject policy the Court must decide if the
7 DPE (replicated below) clearly and unambiguously restricts the scope of liability coverage.
8

9 **THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

10 **LIMITATION OF COVERAGE TO DESIGNATED
11 PREMISES OR PROJECT**

12 This endorsement modifies insurance provided under the following:

13 BUSINESSOWNERS POLICY

14 **SCHEDULE***

15 **Premises:**

16 **Project:**

17 The following is added to the Businessowners Li-
18 ability Coverage Form:

19 This insurance applies only to "bodily injury,"
20 "property damage," "personal injury,"
21 "advertising injury" and medical expenses
arising out of:

1. The ownership, maintenance or use of
the premises shown in the Schedule and
operations necessary or incidental to
those premises; or
2. The project shown in the Schedule.

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23
24
25 *Information required to complete this Schedule, if not shown on this endorsement, will be shown in
26 the Declarations.

1 The DPE (replicated above) strikes one as a boilerplate form not applicable to this
 2 policy that was intentionally left blank. Under **Premises**, nothing is filled in. Under **Project**,
 3 nothing is filled in. (That would make sense as there are no projects discussed in the policy.)

4 Following the blank spaces following “Premises and Project” the paragraph inserted
 5 below them in paragraph 1 reads that the insurance applies to personal injury arising out of
 6 *“the premises shown in the Schedule and operations necessary or incidental to those*
 7 *premises.”* This DPE has the word **“Schedule*”** written at the top of it but nothing is listed
 8 underneath it. This page itself could be viewed as a Schedule that was left blank.

9 The word Schedule also contains an * and refers the policyholder to a footnote which
 10 reads:

11 *Information required to complete this schedule, if not shown on this endorsement, will*
 12 *be shown in the Declarations.*

13 Again does “this schedule” refer to this page that has the word “schedule” written at
 14 the top? Also, how is the policyholder to know if there is information required to complete
 15 this form/schedule? A policyholder expecting broad liability coverage for a business may
 16 think the endorsement is already complete because the endorsement already contains a
 17 Schedule with no Premises Limitations. Also, what declarations are being referred to
 18 exactly? Does this mean policy declarations? There is a “Common Policy Declarations
 19 form”⁷ at the beginning of this lengthy insurance contract which does not reference any
 20 location. In summary, this DPE that purports to limit coverage is not clear.

21 Mid Century needed to list on the DPE what premises it was referring to, there was
 22 no reason to leave blanks. An average reader could conclude that by leaving the **Premises**
 23 section blank there was no premises limitation pertaining to liability claims.

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⁷ Docket Document 13, p. 12.

1 Cases that have considered whether DPE's limit coverage generally hold that the
 2 language in the DPE "must be clear and unequivocal". See for example *American Empire*
 3 *Surplus Lines Insurance Co. v. Chabad House of North Dade, Inc.*, 771 F. Supp. 2d 1336,
 4 1343 (S.D. Fla. 2011), *aff'd*, 450 F. App'x 792 (11th Cir. 2011). In that case the court noted
 5 that DPE clarity was required to convert a CGL policy to a policy that limited coverage to
 6 injuries occurring on specific premises.

7 The case of *Illinois Union Ins. Co. v. Midwood Lumber & Millwork, Inc.*, 2014 WL
 8 639420, cited by Mid-Century is also noteworthy. In that case the policy at issue was almost
 9 identical to the policy in this case. In *Illinois Union* the Court did uphold the DPE premises
 10 limitation, however, the ten properties at issue were listed right on the DPE. The court noted
 11 the DPE itself contained a list of ten specific properties right on the form, they were not
 12 vaguely alluded to in other policy locations.

13 The court in the *Western Heritage Insurance Company v. Hoover*, 2016 WL 1242091
 14 a case also cited by plaintiff held that to be enforced a DPE must be clear and unequivocal.
 15 Moreover, that court noted how incorporation by reference can lead to ambiguity:

16 *In this case, the James River DPE does not clearly convert the policy into a premises
 17 liability policy. The DPE is similarly incorporated by reference into the policy on the
 18 declarations page; however, the declarations page does not list the designated
 19 premises. Therefore, the DPE is not sufficiently clear and unequivocal to put the
 20 insured on notice and convert the policy. Accordingly, we reject James River's
 21 argument to construe the DPE as limiting coverage to injury and damage occurring
 22 on designated premises. See *Dairy Rd. Partners*, 92 Hawai'i at 412, 992 P.2d at 107
 23 (holding that policy language "must be construed liberally in favor of the insured and
 24 [any] ambiguities [must be] resolved against the insurer.").*

25 The cases analyzing DPE's are few. Research did not uncover any cases where a DPE
 26 that did not list the premises limitation on the endorsement itself was analyzed for that
 deficiency. This Court must consider whether the subject policy read as a whole clearly and
 unequivocally alerted the purchaser that the DPE was modifying the policy.

1 Mid-Century misstates the issue as whether Yong's injury at West Marginal Way
 2 arises out of the ownership, maintenance or KBM's use of the Delrdige locations. Instead the
 3 issue is whether the DPE limits coverage to Delridge in the first place. Mid-Century assumes
 4 the DPE is clear and unequivocal and an average purchaser of insurance would understand
 5 the policy coverage was being limited. That is an erroneous assumption.

6 The question before this Court is not whose interpretation of the policy is better or
 7 smarter. The question is whether the DPE at issue would clearly and unequivocally
 8 communicate to an average purchaser of insurance that coverage was being restricted to the
 9 Delrdige locations.

10 It is not burdensome for an insurer to list the designated premises on the Limitation
 11 of Coverage to Designated Premise form. Leaving the space blank after **Premises** only invites
 12 confusion as does the language of the footnote. A policyholder who is not a lawyer, should
 13 not have to go hunting through the policy to try to figure out whether this form itself was a
 14 schedule or what schedules were being referred to in footnotes.

15 V. RELIEF REQUESTED

16 The Court should deny plaintiffs motion for summary judgment. Keith Mathewson
 17 purchased insurance to cover KBM's business liability. If the insurer intended to limit
 18 coverage it needed to do so clearly and unequivocally. It did not.

19 We also ask the Court to consider delaying a ruling on this motion as all parties may
 20 not have been served. (See attached Declaration of John A. Follis.)

21 If the Court does grant the pending motion, Mid-Century has asked to be reimbursed
 22 defense costs. No evidence has been submitted as to what amount of money is being sought
 23 in this regard or for what services or charges. We would ask that an evidentiary hearing be
 24 held to review the services and costs. Any such charges need to be shown as reasonable and
 25 necessary fees and costs.

1 DATED this 30th day of December 2019.

2 ANDERSON HUNTER LAW FIRM, P.S.

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4 By /s/ John A. Follis

5 John A. Follis, WSBA #18513

6 Attorneys for Defendants KBM Seattle and
Mathewson

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RESPONSE OF DEFENDANTS KBM SEATTLE AND
MATHEWSON TO MOTION FOR SUMMARY JUDGMENT - 9

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POLICY NUMBER: 60488-77-40

BUSINESSOWNERS

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

LIMITATION OF COVERAGE TO DESIGNATED PREMISES OR PROJECT

This endorsement modifies insurance provided under the following:

BUSINESSOWNERS POLICY

SCHEDULE*

Premises:

Project:

The following is added to the Businessowners Liability Coverage Form:

This insurance applies only to "bodily injury," "property damage," "personal injury," "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule and operations necessary or incidental to those premises; or
2. The project shown in the Schedule.

*Information required to complete this Schedule, if not shown on this endorsement, will be shown in the Declarations.